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Tuan Mat bin Tuan Ismail v Tan Ah Hin & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(NCVC)(W)-79–03 OF 2017
UMI KALTHUM, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
7 FEBRUARY 2019

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Civil Procedure — Judgment — Judgment made by Terengganu High Court — First and second respondents entered into settlement agreement with appellant following to judgment — Judgment pending assessment of damage — Whether Terengganu High Court judgment was final judgment — Whether first and second respondents' act of retransferring 4.9 million shares from appellant to themselves after fourth respondent obtained Terengganu High Court judgment was premature and against terms of settlement agreement — Whether appellant wrongfully removed as director

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The appellant's claim arose from a settlement agreement entered into between him and the first to the fourth respondents. The settlement agreement spelt out in express terms the rights and obligations of the appellant and the first to the third respondents with respect to the management and ownership of the fourth respondent. The fifth respondent, Suruhanjaya Syarikat Malaysia, was brought

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in as a nominal defendant by the appellant to carry out its statutory functions under the relevant laws. The appellant alleged that there was a breach of the settlement agreement, particularly by the first and second respondents when they had wrongfully removed him as a director of the fourth respondent and when they had wrongfully transferred shares owned by him in the fourth

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respondent prematurely and in breach of the relevant terms of the settlement agreement. The subject matter of the settlement agreement was the proceeds of a judgment obtained by the fourth respondent against the State Government of Terengganu in Kuala Terengganu High Court Civil Suit No 22–06 of 2003 ('the Terengganu High Court judgment'). At the time the present action was

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heard by the learned trial judge, the Terengganu High Court judgment was pending assessment of damages by the senior assistant registrar. By the present action, the appellant sought, inter alia: (a) a declaration that the settlement agreement was valid and binding on the first and second respondents; (b) an order directing the first, second and third respondents whether by themselves

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or through their agents or employees to refrain from selling, disposing of, and transferring the 4.9 million shares in the fourth respondent pending disposal of the action; (c) an order directing that the appellant be retained as a director of the fourth respondent; and (d) an order that the transfer of the 4.9 million shares in the fourth respondent, originally in the appellant's name, to the

second and second respondents or to any third party be deemed invalid, void and of no effect. The issues for consideration were: (i) whether the first and second respondents' act of retransferring the 4.9 million shares from the appellant to themselves after the fourth respondent obtained the Terengganu High Court judgment was premature and against the terms of cl 2 of the settlement agreement; and (ii) whether the Terengganu High Court judgment was a 'final judgment', which by para 2 cl 2 of the settlement agreement also refers to 'final date' and 'final settlement amount'.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) The Terengganu High Court judgment was indeed a final judgment as it had finally determined the Terengganu State Government's liability to pay damages to the fourth respondent for its wrongful termination of the timber concession agreement. The order for payment of damages was implicit in the judgment, except that the quantum was to be determined by way of assessment by the senior assistant registrar. It was true that under cl 2 of the settlement agreement, it was agreed by the parties that 'final judgment' means the 'final settlement amount', which was to be procured either through an out of court settlement or through a court judgment. However, it was a private arrangement between the parties and it could not have the effect of determining the finality of the court judgment. It was not for the parties to decide if the Terengganu High Court judgment was final or otherwise. Another reason was because it was because the Terengganu High Court judgment was appealable without leave of court. It was therefore incorrect for the appellant to say that the Terengganu High Court judgment only becomes final after the 'final samount' (damages) had been determined by the court (see paras 32, 41–42 & 44–45).

(2) The learned trial judge was perfectly entitled to come to a finding that the appellant had breached the settlement agreement. There was no basis to contend that the learned judge had committed errors of law or had mishandled the facts or was confused as to the issues to be tried. The learned trial judge was right in any event to hold that the settlement agreement had been properly terminated by the respondents due to its breach by the appellant, thereby validating the retransfer of the 4.9 million shares to the first and second respondents. The appellant himself admitted that he failed to comply with cll 2 and 4(b) of the settlement agreement. The breach had therefore been established by the appellant's own admission (see paras 64 & 69–70).

(3) As for the appellant's removal from the fourth respondent, the appellant failed to show that his removal was not in accordance with the law or the

articles of association of the fourth respondent. On the evidence before him, the learned trial judge was entitled to come to that conclusion (see para 71).

[Bahasa Malaysia summary

Tuntutan perayu timbul daripada satu perjanjian penyelesaian yang dibuat antara perayu dan responden pertama hingga keempat. Perjanjian penyelesaian menyatakan terma nyata hak-hak dan kewajipan perayu dan responden pertama hingga ketiga berkenaan dengan pengurusan dan pemilikan responden keempat. Responden kelima, Suruhanjaya Syarikat Malaysia, telah dibawa masuk sebagai defendan nominal oleh perayu untuk melaksanakan fungsi berkanunnya di bawah undang-undang yang berkaitan. Perayu mendakwa terdapat pelanggaran perjanjian penyelesaian, khususnya oleh responden pertama dan kedua apabila mereka secara salah menyingkirnya sebagai pengarah responden keempat dan apabila mereka secara salah memindahkan saham yang dimiliki olehnya dalam responden keempat secara pramatang dan melanggar terma perjanjian penyelesaian yang berkaitan. Subjek perjanjian penyelesaian adalah hasil penghakiman yang diperoleh oleh responden keempat terhadap Kerajaan Negeri Terengganu di Mahkamah Tinggi Kuala Terengganu Guaman Sivil No 22–06 Tahun 2003 ('penghakiman Mahkamah Tinggi Terengganu'). Pada masa tindakan ini telah didengar oleh hakim bicara yang bijaksana, penghakiman Mahkamah Tinggi Terengganu sedang menanti penilaian ganti rugi oleh penolong kanan pendaftar. Dengan tindakan ini, perayu memohon, antara lain: (a) perisytiharan bahawa perjanjian penyelesaian adalah sah dan mengikat responden pertama dan kedua; (b) satu perintah yang mengarahkan responden pertama, kedua dan ketiga sama ada secara sendiri atau melalui agen atau pekerja mereka untuk mengelak daripada menjual, melupuskan, dan memindahkan 4.9 juta saham dalam responden keempat sementara menunggu pelupusan tindakan itu; (c) satu perintah yang mengarahkan bahawa perayu dikekalkan sebagai pengarah responden keempat; dan (d) satu perintah bahawa pemindahan 4.9 juta saham dalam responden keempat, pada asalnya pada nama perayu, kepada responden kedua dan kedua atau kepada mana-mana pihak ketiga dianggap tidak sah, batal dan tidak berkuatkuasa. Isu-isu untuk pertimbangan adalah: (i) sama ada perbuatan responden pertama dan kedua untuk memindahkan semula 4.9 juta saham daripada perayu kepada diri mereka sendiri setelah responden keempat memperoleh penghakiman Mahkamah Tinggi Terengganu adalah pramatang dan bertentangan dengan syarat-syarat klausa 2 perjanjian penyelesaian; dan (ii) sama ada penghakiman Mahkamah Tinggi Terengganu adalah 'penghakiman muktamad', yang mana dengan perenggan 2 klausa 2 perjanjian penyelesaian tersebut juga merujuk kepada 'tarikh muktamad' dan 'jumlah penyelesaian muktamad'.

Diputuskan, menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Penghakiman Mahkamah Tinggi Terengganu sememangnya penghakiman muktamad kerana ia telah akhirnya menentukan liabiliti Kerajaan Negeri Terengganu untuk membayar ganti rugi kepada responden keempat atas penamatan salah atas perjanjian kayu tersebut. Perintah pembayaran gantirugi adalah tersirat dalam penghakiman, kecuali kuantum itu akan ditentukan dengan cara penilaian oleh penolong kanan pendaftar. Memang benar bahawa di bawah klausa 2 perjanjian penyelesaian, adalah dipersetujui oleh pihak-pihak bahawa 'penghakiman muktamad' bermaksud 'jumlah penyelesaian muktamad', yang akan diperolehi sama ada melalui penyelesaian di luar mahkamah atau melalui penghakiman mahkamah. Walau bagaimanapun, ia merupakan persetujuan peribadi antara pihak-pihak dan ia tidak boleh memberi kesan atas penentuan penghakiman muktamad mahkamah. Ia bukanlah bagi pihak-pihak untuk memutuskan sama ada penghakiman Mahkamah Tinggi Terengganu adalah muktamad atau sebaliknya. Sebab lain adalah kerana penghakiman Mahkamah Tinggi Terengganu boleh dirayu tanpa kebenaran mahkamah. Oleh itu adalah tidak tepat bagi perayu untuk mengatakan bahawa penghakiman Mahkamah Tinggi Terengganu hanya menjadi muktamad selepas 'jumlah penyelesaian muktamad' (ganti rugi) telah ditentukan oleh mahkamah (lihat perenggan 32, 41–42 & 44–45).

(2) Hakim bicara yang bijaksana berhak mendapat dapatan bahawa perayu telah melanggar perjanjian penyelesaian. Tiada asas untuk menegaskan bahawa hakim yang bijaksana telah melakukan kesalahan undang-undang atau telah salah mengendalikan fakta-fakta atau keliru tentang isu-isu yang hendak dibicarakan. Hakim bicara yang bijaksana adalah betul dalam apa jua keadaan untuk memastikan bahawa perjanjian penyelesaian telah ditamatkan dengan betul oleh responden akibat pelanggaran oleh perayu, dengan itu mengesahkan pemindahan semula 4.9 juta saham kepada responden pertama dan kedua. Perayu sendiri mengakui bahawa dia gagal mematuhi klausa 2 dan klausa 4(b) perjanjian penyelesaian. Oleh itu, pelanggaran tersebut telah dibuktikan oleh pengakuan perayu sendiri (lihat perenggan 64 & 69–70).

(3) Bagi penyingkiran perayu daripada responden keempat, perayu gagal menunjukkan bahawa penyingkirannya tidak mengikut undang-undang atau artikel persatuan responden keempat. Dengan keterangan di hadapan baliau, hakim bicara yang bijaksana berhak mendapatkan kesimpulan tersebut (lihat perenggan 71).]

Notes

For cases on judgment in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5148–5446.

Cases referred to

Bozson v Altrincham Urban District Council [1903] 1 KB 547, CA (refd)
S & M Jewellery Trading Sdn Bhd & Ors v Fui Lian-Kwong Hing Sdn Bhd [2015] 5 MLJ 717; [2015] 8 CLJ 16, FC (refd)
Samar binte Mansor v Mustafa Kamarul Ariffin [1974] 2 MLJ 71, FC (refd)
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)

Legislation referred to

Contracts Act 1950 s 40

Gurdit Singh (Vasanthan Gopalan and Nashvinder Singh Gill with him) (Sharif & Khoo) for the appellant.
Emir Eizat bin Ab Malik (Fairuzhazwani bt Abdul Rahim with him) (Enna Nadra Yacob) for the first, second, third and fourth respondents.
Aida Adhha Abi Bakar (Fadilah Abd Wahab with her) (Senior Federal Counsel, Suruhanjaya Syarikat Malaysia) for the fifth respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] We heard and dismissed the appellant's appeal and affirmed the decision of the High Court dismissing his claim against the respondents. These are the grounds of our decision.

[2] The appellant's claim arose from a settlement agreement dated 22 February 2010 entered into between him and the first to the fourth respondents. The settlement agreement spelt out in express terms the rights and obligations of the appellant and the first to the third respondents with respect to the management and ownership of the fourth respondent, SKKPJ (TM) Sdn Bhd.

[3] The fifth respondent, Suruhanjaya Syarikat Malaysia, was brought in as a nominal defendant by the appellant to carry out its statutory functions under the relevant laws.

[4] The appellant alleged that there was a breach of the settlement agreement, particularly by the first and second respondents (Tan Ah Hin and Te Soh Peng) in the following acts:

(a) they had wrongfully removed him as a director of the fourth respondent; and

(b) they had wrongfully transferred shares owned by him in the fourth respondent prematurely and in breach of the relevant terms of the settlement agreement.

[5] The subject matter of the settlement agreement was the proceeds of a judgment dated 2 December 2011 obtained by the fourth respondent against the State Government of Terengganu in Kuala Terengganu High Court Civil Suit No 22–06 of 2003 ('the Terengganu High Court judgment'). A

[6] At the time the present action was heard by the learned trial judge, the Terengganu High Court judgment was pending assessment of damages by the senior assistant registrar. In other words, the exact amount of the proceeds of the judgment had yet to be known. B

[7] By the present action, the appellant sought, inter alia, the following declaratory reliefs: C

(a) a declaration that the settlement agreement dated 22 February 2010 was valid and binding on the first and second respondents;

(b) an order directing the first, second and third respondents whether by themselves or through their agents or employees to refrain from selling, disposing of, and transferring the 4.9 million shares in the fourth respondent pending disposal of the action; D

(c) an order directing that the appellant be retained as a director of the fourth respondent; and E

(d) an order that the transfer of the 4.9 million shares in the fourth respondent, originally in the appellant's name, to the second and second respondents or to any third party be deemed invalid, void and of no effect. F

[8] At the trial, the following facts were agreed by the parties:

(a) the fourth respondent had no business activity, being a dormant company; G

(b) the appellant was the promoter and had formed and registered the fourth respondent at his own expense and costs on 15 August 1998;

(c) the fourth respondent was wholly owned by the appellant; H

(d) the first directors and shareholders of the fourth respondent were the appellant and his son by the name of Tuan Zainal Abidin bin Tuan Mat; I

(e) at its inception, the fourth respondent had two fully paid up shares;

(f) on 14 May 2001, the appellant raised a capital sum of RM4.9m to increase

A the paid up capital of the fourth respondent to RM5m. The shareholding of the fourth respondent was:

(i) the appellant — RM4,995,000 shares; and

(ii) Tuan Zainal Abidin bin Tuan Mat — RM5,000 shares.

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The appellant had invested RM5m of his own funds in the fourth respondent;

(g) in October 2001, the State Government of Terengganu awarded a timber C concession in Empangan Kedua, Hutan Simpan Tembat dan Petuan, District of Hulu Terengganu of about 41,000 acres to the fourth respondent;

(h) pursuant to two letters dated 31 October 2001 and 29 November 2001, the D Terengganu State Government agreed to assign the said timber concession to the fourth respondent;

(i) the appellant required a sum of RM5.3m to pay the premium for the timber concession;

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(j) through one Yaacob bin Mat Yim, the first respondent (Tan Ah Hin) agreed to pay the premium of RM5.3m in consideration of which the first respondent through his nominees was allocated 5 million shares in the fourth respondent;

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(k) the fourth respondent's paid up capital was increased to RM10m to accommodate this. The exercise was carried out in about October 2001 and as at 31 October 2001, the shareholding structure in the fourth respondent was as follows:

G (i) paid up capital — 10 million shares; and

(ii) shareholders:

(1) the appellant: 4,995,000 shares;

(2) Tuan Zainal Abidin bin Tuan Mat: 5,000 shares; H

(3) Astral Sun Sdn Bhd: 2,000 shares; and

(4) Amalglow Engineering Sdn Bhd: 3,000 shares;

I (l) Tuan Zainal Abidin bin Tuan Mat was the appellant's nominee whilst Astral Sun Sdn Bhd and Amalglow Engineering Sdn Bhd were the first respondent's nominees;

(m) on 15 August 2002, the Terengganu State Government terminated the

timber concession agreement with the fourth respondent;

(n) on 3 February 2003, the fourth respondent commenced action against the Terengganu State Government in the Kuala Terengganu High Court ('the Terengganu Civil Suit') for the termination of the timber concession agreement. The main witnesses for the fourth respondent were the appellant and Yaacob bin Mat Yim;

(o) earlier, upon securing the timber concession agreement in October 2001, the first respondent had proposed for a public listing of the fourth respondent. The appellant agreed. The first respondent then took the fourth respondent through a journey of share restructuring, ending with the share structure and directorship as follows as at 22 February 2010:

	Director	Shares
(a) The appellant	Yes	Nil
(b) First respondent	Yes	4,700,000
(c) Second respondent	No	2,000,000
(d) Third respondent	Yes	2,300,000
(e) Kho Ah Tee	No	1,000,000

(p) the first and second respondents then entered into the settlement agreement with the appellant in relation to the Terengganu Civil Suit. The agreement recognised the following facts:

(i) that it was the appellant who established the fourth respondent;

(ii) that the appellant was instrumental in securing the timber concession agreement for the fourth respondent; and

(iii) that the appellant was entitled to 50% of the shares in the fourth respondent. This 50% represented the appellant's original investment of RM5m in the fourth respondent;

(q) the following were the agreed terms of the settlement agreement between the appellant and the first and second respondents:

(i) that the appellant shall be appointed to liaise, negotiate and come up with a settlement plan for the fourth respondent with the State Government of Terengganu in respect of the Terengganu Civil Suit ('the final settlement amount');

(ii) as consideration, the first and second respondents shall transfer 4.9 million shares in the fourth respondent to the appellant;

(iii) the purpose of the transfer of the 4.9 million shares to the appellant was to secure the final settlement amount with the Terengganu State

Government either by way of entering into a consent judgment or by way of a final judgment obtained from the court ('the final date');

(iv) the appellant shall retransfer the 4.9 million shares to the first and second respondents only after a consent judgment was entered into or after a final judgment had been obtained from the court;

(v) the appellant shall be a director of the fourth respondent;

(vi) the appellant shall be entitled to receive an amount equivalent to 50% of the final settlement amount subject to deductions spelt out as follows:

(1) the appellant undertook to bear any outstanding commission, royalty, tax, additional tax assessments which are payable on the 50% payment to be received by him; and

(2) the appellant to bear all legal charges in relation to the said civil suit in connection with the preparation of the agreement and in connection with any settlement agreement entered into with the Terengganu State Government;

(vii) the final settlement amount shall be paid directly to the fourth respondent;

(viii) all taxes payable on the final settlement amount shall be paid by the parties respectively in their parts of the entitlements;

(ix) the settlement agreement constituted the entire agreement between the parties, that is, that all negotiations or commitments made before the signing of the settlement agreement were superseded by the settlement agreement;

(x) in the performance of the terms of the settlement agreement, in or about September 2011, the 4.9 million shares were transferred to the appellant. The appellant was already a director of the fourth respondent since 22 February 2010; and

(xi) the Terengganu Civil Suit could not be settled and no consent judgment was recorded, so it went for trial;

(r) on 2 December 2011, after a full trial of the Terengganu Civil Suit, judgment was entered in favour of the fourth respondent against the Terengganu State Government on liability. The Terengganu High Court then made an order for damages to be assessed by the senior assistant registrar and to be paid to the fourth respondent after the assessment;

(s) the hearing of the assessment of damages was still continuing. The quantum of damages to be awarded has not yet been determined by the court.

[9] The following facts were not agreed by the appellant: A

(a) that he made the representations;

(b) that pursuant to cl 4 of the settlement agreement he must pay the identified payments before receipt of the final settlement amount; and B

(c) that the 'Final Date' was the date of the Terengganu High Court judgment although damages had yet to be assessed on the basis that liability had been determined.

[10] The central issue before the High Court and before us was whether the first and second respondents' act of retransferring the 4.9 million shares from the appellant to themselves after the fourth respondent obtained the Terengganu High Court judgment was premature and against the terms of cl 2 of the settlement agreement. C

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[11] Whether or not the retransfer of the 4.9 million shares to the first and second respondents was premature and against the terms of cl 2 of the settlement agreement turned on the question whether the Terengganu High Court judgment was a 'final judgment', which by para 2 cl 2 of the settlement agreement also refers to 'final date' and 'final settlement amount'. E

[12] According to learned counsel for the appellant, this was 'the only real issue' before the court. We reproduce below paras 10.1 and 10.2 of counsel's written submission: F

> 10.1 In summary the only real issue was whether the Judgment dated 12/02/2011 was a final judgment or an interlocutory judgment. If the former, then R1-R4's conduct in the retransfer of the shares was proper. If the latter, then R1–R4's conduct was premature and was conduct in breach of clause 2 of the Settlement Agreement.
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> 10.2 But in either event, the Settlement Agreement must still be valid and binding on the Appellant and R1–R4. G

[13] Given the position taken by the appellant, we accordingly proceeded to determine the appeal on the premise that learned counsel had set out, which is, if the Terengganu High Court judgment was a 'final judgment', the retransfer of the 4.9 million shares from the appellant to the first and second respondents would be valid and proper. H

[14] Conversely, if the Terengganu High Court judgment was not a 'final judgment' but an interlocutory judgment, the retransfer of the 4.9 million shares from the appellant to the first and second respondents would be premature and therefore invalid and the appellant would be entitled to succeed in this appeal and his claim against the respondents would be allowed in terms. I

[15] The 'only real issue' that learned counsel spoke of relates to cl 2 of the settlement agreement, which reads:

> It is hereby agreed by all parties that the transfer of shares from the Transferor to Tuan Mat Tuan Ismail is for the purpose of securing Final Settlement Amount with the State Government of Terengganu either by way of entering into a consent judgment in respect of outside court settlement or by way of final judgment obtained from court ('Final Date').
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> It is hereby agreed by all parties that only after the stated Final Date above, Tuan Mat Tuan Ismail shall retransfer the whole shares back to the respective Transferor.

[16] Going by para 1 of cl 2 above, it is clear that the initial transfer of the 4.9 million shares to the appellant was for the purpose of securing a 'final settlement amount' from the Terengganu State Government for its act of terminating the concession agreement.

[17] Obviously the duty to secure the 'final settlement amount' from the Terengganu State Government rested on the appellant's shoulders as the transfer to him of the 4.9 million shares was meant for that specific purpose. It was not meant for his personal benefit without him having to make any effort to secure the 'final settlement amount' from the Terengganu State Government.

[18] This obligation on his part was made clear by cl 1 of the settlement agreement which provides as follows:

> In consideration of the Transferor agreeing to transfer the share units to the Transferee, all parties to this agreement do hereby agree to appoint the Transferee to liaise, to negotiate and to come up with the settlement plan for the Company with the Terengganu State Government in respect of the said case ('Final Settlement Amount') and the Transferee do accept the appointment upon the terms and conditions hereinafter set out.

[19] The manner as to how the 'final settlement amount' was to be secured is stipulated by cl 2 of the settlement agreement which provides that it was to be done by either of the following alternatives:

(a) by recording a consent judgment between the fourth respondent and the Terengganu State Government; or

(b) by the fourth respondent obtaining a final judgment from the court against the Terengganu State Government.

[20] The question then arose: did the appellant carry out his contractual obligation to secure the 'final settlement amount', and if so when was he

obligated to retransfer the 4.9 million shares to the first and second respondents? A

[21] This was key to the issue and the answer lies in para 2 cl 2 of the settlement agreement, which provides that the retransfer was to be effected either: B

(a) after a consent judgment had been recorded between the fourth respondent and the Terengganu State Government; or

(b) after 'final judgment' had been obtained from the court by the fourth respondent, if no consent judgment could be recorded. C

[22] It is important to note that cl 2 of the settlement agreement does not say that the retransfer of the 4.9 million shares from the appellant to the first and second respondents could only be done after the quantum of damages had been assessed and determined by the court. It merely says that the retransfer of the shares was only to be done after 'final judgment' had been obtained from the court (where no out of court settlement could be reached). D

[23] As it turned out, no out of court settlement was reached between the fourth respondent and the Terengganu State Government and thus no consent judgment was recorded. What transpired was, the fourth respondent obtained judgment against the Terengganu State Government in the Kuala Terengganu High Court for terminating the timber concession agreement. It was a judgment on liability after a full trial of the action. E F

[24] The material parts of the Terengganu High Court judgment read as follows:

> MAKA ADALAH HARI INI DIPERINTAHKAN bahawa tuntutan Plaintiff terhadap Defendan dibenarkan atas isu liability dan tuntutan balas Defendan terhadap Plaintif ditolak dengan kos DAN AKHIRNYA ADALAH DIPERINTAHKAN bahawa ganti rugi hendaklah ditaksirkan oleh Penolong Kanan Pendaftar dan dibayar oleh Defendan kepada Plaintif seperti ditaksirkan. G H

[25] The appellant did not dispute that this was a 'judgment obtained from court' within the meaning of cl 2 of the settlement agreement, with damages to be assessed by the senior assistant registrar. His dispute was over the question whether the judgment was a 'final judgment'. I

[26] The appellant's contention was that the Terengganu High Court judgment on liability was only an interlocutory judgment and not a final judgment. His reasoning was that unless and until the quantum of damages had been finally determined by the senior assistant registrar, the judgment

remained an interlocutory judgment. In other words, it was a suspended judgment pending assessment of damages.

[27] It follows, according to learned counsel, that until the amount of damages had been finally determined by the senior assistant registrar, the respondents had no right to retransfer the 4.9 million shares from the appellant to the first and second respondents, for the simple reason that the time for the retransfer of the shares had not come. In other words, the judgment on liability had not become final. The respondents contended otherwise.

[28] Thus, on the issue of when was the appellant obligated to retransfer the 4.9 million shares to the first and second respondents, the dispute was over the construction to be given to the phrase 'final judgment' in cl 2 of the settlement agreement. The construction that learned counsel for the appellant gave was as follows (para 56 of counsel's written submission):

> 56.1 It is submitted that a determination as to liability does not finally or fully dispose of the rights of the parties where damages are also claimed in the action. That will only be a partial determination of the rights of the parties. The determination of liability is not an end in itself. Such a determination is not the only thing that R4 is asking for. Damages are really what R4 is seeking, and determining liability is a necessary step towards deciding whether damages or compensation are payable, and if so, what is the appropriate amount. On this view, an interlocutory judgment with damages to be assessed will not be an order which finally dispose of the rights of the parties in the action.
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> 56.2 Therefore, the Judgment is interlocutory for 2 distinct reasons. First, there was no determination on the merits as to the rights of the parties. Second, and more importantly, the Judgment was, in any event, interlocutory.

[29] Learned counsel's emphasis was clearly on the point that 'Final Date' (which also refers to 'final judgment') in cl 2 of the settlement agreement means the 'final settlement amount' which, having regard to the intention of the contracting parties, refers the amount of damages as determined by the court after assessment of damages.

[30] What learned counsel was trying to say was that the words 'final judgment' and 'final settlement amount' must be read together and harmoniously in determining whether the Terengganu High Court judgment on liability was a final judgment or an interlocutory judgment. This was how learned counsel articulated his argument, as laid out by the learned trial judge in his grounds of judgment at pp 10–12, as follows:

> (1) A reasonable interpretation of the 'final settlement amount' ('FSA') appearing in cll 1, 2 and 4 of the S/A when read together means:
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> P liaising, negotiating and coming up with a settlement plan for D4 with the

> Terengganu State Government in connection with the civil case. Objectively, it can only mean that P shall come up with a quantum ie monetary sum that D4 could claim against the Terengganu State Government.
>
> It may be either by way of a consent judgment or final judgment. The phrase can only mean a monetary amount secured by any of the said two types of judgment payable by the defendant in that case. P has to secure that amount either by way of agreement with the defendant or via judicial determination by the court by assessment of the quantum payable by the defendant.
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> This is clear from a reading of cl 4 which entitles P to 50% of the FSA subject to deductions of payments due from P.
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> This construction is also consistent with the background facts of this case where P contributed 50% of the paid up share capital of D4 and thereby, was entitled to 50% of the FSA.
>
> (2) The judgment dated 2 December 2011 is certainly not a final but only an interlocutory judgment as it had only decided on the issue of liability only in favour of D4 and left the issue of quantum to be determined by way of assessment of damages (reference made to *Halsbury's Laws of England* (4th Ed) para 506).
>
> (3) The 'final date' in the S/A should be the date when the final settlement amount has been secured either by a consent judgment or by a final judgment. That date is when the senior assistant registrar has assessed the amount of damages payable by the Terengganu State Government to P. The parties agreed that the court has not yet determined the amount payable on the assessment hearing.
>
> Therefore the 'Final Date' has not arrived yet.

[31] The learned trial judge rejected the argument and accepted the respondents' construction and held as follows:

> [15] In regard to the issue whether the KTHC had entered final judgment which would enable the 4.9 million shares to be retransferred to D1 and D2, the important question for consideration is whether the court had merely made an interlocutory order and not a final decision based on the definition above relied on by P. In my considered view it is incorrect and erroneous to consider the court's finding on liability after a full trial to be merely an interlocutory order. The court had fully heard evidence and had given judgment on liability of the defaulting party leaving only the issue of damages to be assessed, which is a process for a consequential order to be made by the Registrar. Clauses 1 and 2 of the S/A are clear and explicit that final settlement may be reached with the Terengganu Government by either out of court settlement or final judgment by the court. In this instance the KTHC had undoubtedly finally adjudged or determined the issue of liability of the defendant to pay damages to D4, leaving only the issue of quantum to be decided by the Registrar.

[32] We agreed with the learned trial judge and had nothing substantial to add save to emphasise the point that the Terengganu High Court judgment was

A indeed a final judgment as it had finally determined the Terengganu State Government's liability to pay damages to the fourth respondent for its wrongful termination of the timber concession agreement. The order for payment of damages was implicit in the judgment, except that the quantum was to be determined by way of assessment by the senior assistant registrar.

B

[33] The word 'interlocutory' which learned counsel used to describe the Terengganu High Court judgment is a legal term and is defined by *Barron's Dictionary of Legal Terms* (5th Ed) as follows:

C

> provisional; temporary. An order or judgment that does not determine the issues but directs further proceeding preliminary to a final order or decree. Until final decree, an interlocutory judgment is subject to change by the court to meet the needs of the case and is not appealable except by leave of court.

D **[34]** The *Oxford Dictionary of Law* (7th Ed) gives the following meaning to the word:

> During the course of proceedings. Before the introduction of the Civil Procedure Rules in 1999, the term was applied to certain processes in civil proceedings occurring between the initiation of the action and the final judgment (such as
E interlocutory injunctions). Under the Civil Procedure Rules, it has been replaced by the term interim.

[35] In *Halsbury's Laws of England* (4th Ed) the learned authors at para 506 defined the word to mean:

F

> An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declaration of rights already given in the final judgment are to be worked out, is termed 'interlocutory'.

G

[36] In *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 Lord Alverstone CJ laid down the following test to determine if a judgment is final or interlocutory:

H

> It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

I **[37]** Clearly, the Terengganu High Court judgment on liability was not a provisional or temporary judgment. Nor was it subject to change or alteration by the court. The entry of the judgment was also not a process that occurred between the filing of the Terengganu Civil Suit and the pronouncement of the judgment, such as an interlocutory injunction.

[38] It was a judgment that was reached after a full hearing, during which both oral and documentary evidence were adduced by the parties. Nor does the judgment fall within the definition given in *Halsbury's Laws of England* as it was not an 'order' made before or after judgment, or merely on a matter of procedure, but was a final judgment on the liability of the Terengganu State Government to pay damages to the fourth respondent.

[39] The fact that damages was to be assessed was merely a consequential process to determine the quantum that the fourth respondent was entitled to. But in so far as the judgment itself was concerned, it was a final judgment.

[40] It was untenable in our view to argue that the order for assessment of damages had the effect of altering the status of the judgment from that of a final judgment to that of an interlocutory or temporary judgment, or that it had the effect of qualifying the finality of the judgment merely because the amount of damages had yet to be determined by the court.

[41] It is true that under cl 2 of the settlement agreement, it was agreed by the parties that 'final judgment' means the 'final settlement amount', which was to be procured either through an out of court settlement or through a court judgment.

[42] But that was a private arrangement between the parties. Being a private arrangement between the parties, it could not have the effect of determining the finality of the court judgment. It was not for the parties to decide if the Terengganu High Court judgment was final or otherwise. That will be to usurp the function of the court.

[43] What was agreed between the parties was that the first and second respondents had the right to retransfer the shares to themselves once the Terengganu State Government was held by the court to be liable to pay damages to the fourth respondent. That was exactly what the High Court decided in the Terengganu Civil Suit, and that was all that was required to trigger enforcement of the second paragraph of cl 2 of the settlement agreement.

[44] There is another reason why in our view the Terengganu High Court judgment on liability was a final judgment and this is because it was appealable without leave of the court. Only a judgment or order that is final in effect can be appealed against. This is not so in the case of an interlocutory judgment with no element of finality. The fact that the matter had been fixed for assessment of damages is irrelevant if otherwise the judgment on liability was final in effect.

[45] It was therefore incorrect for the appellant to say that the Terengganu

A High Court judgment only becomes final after the 'final settlement amount' (damages) had been determined by the court.

[46] In any event, there is nothing to stop the appellant from claiming his 50% share of the 'final settlement amount' from the fourth respondent after
B damages had been assessed, subject to deductions of any payment due from him. That, after all, was the scheme of arrangement between the parties.

[47] Other than the finality of the Terengganu High Court judgment, it was also the respondents' case in answer to the appellant's claim that the retransfer
C of the 4.9 million shares to the first and second respondents and the appellant's removal from the fourth respondent were both valid as the settlement agreement had been terminated due to the appellant's own breach of its fundamental terms.

D

[48] The appellant on the other hand contended that the appellant had been wrongfully removed as a director of the fourth respondent. It was pointed out that there is no provision in the settlement agreement for the removal or resignation of the appellant as director of the fourth respondent and that in
E fact, by virtue of cl 3, all the parties agreed that the appellant would be a director of the fourth respondent.

[49] Learned counsel's argument on this issue is encapsulated in the following three paragraphs of his written submissions:

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> 9. The High Court fell into error in failing to appreciate the real reason advanced as pleaded by R1–R4 for the transfer of the shares and the removal of the Appellant as a director of R4. Therefore the High Court had considered irrelevant matters in the form of the alleged misrepresentations and non-payment of the prescribed payments in clause 4(a) and (b) of the Settlement Agreement. These 2 allegations
G were not the reasons for the transfer of the shares to R1 to R2 and the removal of the Appellant as a director of R4 ...
>
> 40.2 The fundamental error that the High Court made was to find that the Appellant had breached the Settlement Agreement by the failure to negotiate a settlement with the State of Terengganu and by non-payment of the prescribed
H payments under clause 4(a) thereby entitling R1–R4 to transfer the shares to R1 and R2 BUT the High Court had failed to recognize that the only reason advanced by R1 to R4 for the transfer of the shares was that the Final Date had been determined by the Judgment under clause 2. Therefore the High Court had considered irrelevant matters and unpleaded allegations for the transfer of the shares.
>
I 41 In the premises the High Court had clearly misdirected itself on the law and on the facts. There was simply no proper appreciation of the evidence in totality.

[50] What we could gather from the argument was that the learned trial judge had decided the case on a completely wrong footing, which if true would

constitute an error of law warranting our intervention. A

[51] The thrust of the appellant's argument was that instead of focusing his mind on the 'final date' to determine the right time for the retransfer of the 4.9 million shares to the first and second respondents, the learned trial judge went off tangent by concentrating on the appellant's failure to negotiate a settlement with the Terengganu State Government and also by his non-payment of the prescribed payments under cl 4(a) of the settlement agreement. B

[52] It was pointed out that this was not the pleaded case of the respondents and should not have been given any consideration by the learned trial judge, the law being settled that parties are bound by their pleadings. In other words, it was wrong for the learned trial judge to have made out a case for the respondents when it was not what the respondents themselves pleaded in their statement of defence. C D

[53] It was argued that on the pleadings, the issue before the learned trial judge was not whether the appellant had breached the settlement agreement by failing to discharge his obligations under the settlement agreement but whether the time had come for him to retransfer the 4.9 million shares to the first and second respondents. E

[54] Given the nature of the complaint and to provide context, we think it is necessary to reproduce in extenso the relevant parts of the learned trial judge's grounds of judgment, as follows: F

> [12] Secondly, PW1 (the appellant) had clearly failed to perform his obligations under cl 2 of the JVA and was, thus, in breach of trust set out in this clause. PW1 had not in any way participated in securing settlement of the Terengganu case whether through final judgment and/or out of court settlement. PW1's assertion that he had taken various steps in this regard was shown to be nothing but a bare assertion not supported by any evidence and plainly untrue based on the events that transpired. G
>
> ...
>
> [16] Be that as it may, regardless of the progress or outcome of the KTHC suit, the essential question arising from the pleaded defence is whether P (the appellant) had breached cl 2 of the S/A in regard to securing final settlement or out of court settlement in that suit. As correctly pointed out by the defence, P had only made bare allegations of compliance with cl 2 without providing any proof of the same. Neither did he proffer any reasonable explanation for this failure or omission to discharge his contractual obligations. The defence position on this matter was confirmed by DW2, the solicitor for D4 at the material time, to the effect that P was not involved in the negotiations with the TSLA for the settlement of the said suit on 17 January 2012. H I
>
> [17] PW1 had also admittedly breached his undertaking under cl 4 of the JVA, specifically sub-cll (a) and (b), when he failed to make any of the prescribed

payments that he was obliged to make in respect of the suit. He made a bare assertion that he had paid the legal fees of the solicitors representing D4 at the material time (M/S Thayalan and Associates) in the said suit but was unable to produce any proof whatsoever, cl 4(2) contains an unequivocal undertaking by PW2 to bear all legal charges in connection with the said suit which, on the evidence, PW2 blatantly breached. All payments that PW1 had allegedly made towards legal and professional fees were proven not to be not true at all. A cheque that he had issued for RM245,000 for the professional fees was dishonoured and he failed to pay legal fees of about RM1.3m. He appeared to have given false evidence in regard to payments made pursuant to cll 4(a) and (b). When questioned why he had not complied with cl 4(a) and (b), the reason advanced that he was entitled to hold on until he had received 50% of the settlement sum was wholly untenable and in breach of the express terms of the S/A.

[18] Thirdly, D1 had produced unrebutted documentary evidence proving that he had expended more than RM22m for the interests of D4 whereas PW1 had failed to make any payment whatsoever towards any of D4's interests, including the project in Terengganu and the said KTHC civil action. He had only made bare assertions without any evidence which remained unproven throughout the trial. On the contrary, he had utterly failed to discharge his obligations and the responsibilities towards D4 under the S/A as undertaken in return for the 4.9 million units that he had received without payment. D1 (DW1) on the other hand supported his statement with several vouchers produced in court which went unchallenged. So too was DW1's assertion that he was the main developer of D4 in carrying out the logging project and corporate restructuring whereas PW2 had practically done nothing save for making unfulfilled promises and false representations in regard to securing resolution of the dispute with the Terengganu Government.

[19] Fourthly, PW1, purportedly a witness of truth, wholly lacked credibility. His evidence in several instances was filled with contradictions, discrepancies and was contrary to the agreed documentary evidence as well as statements on material issues that were inherently incredible and did not make any sense. He had further misled (sic) the Defendants as to his connections with persons in authority in the Terengganu particularly the MB and the State Ruler, that led to D1 and D2 entering into the S/A and transferring ownership of 4.9 million units of shares to him in anticipation of his services and contribution in respect of the KTHC suit. There was a total failure of consideration on his part that the overall evidence manifestly disclosed.

[20] His credibility was further eroded by several material aspects of his evidence alluded to in the defence submission. Inter alia, PW2's evidence that he owned the 4.9 million shares in D4 before executing the S/A was shown to be false. PW2's denial of the fact that he was no longer a majority shareholder of D4 from 2002–2010 contradicted item 16 of the agreed facts as well as the company records. He also disputed cl 2 of the S/A as to the agreed purpose of D1 and D2 transferring 4.9 units of shares in D4 to him but instead maintained that he was the original owner of these units. This stance taken by him that contradicted undisputed facts reflected a serious lack of creditworthiness.

[21] For the foregoing reasons, I concluded that the plaintiff himself was in breach

of contract when he failed to discharge his obligations under the S/A and failed to comply with its fundamental terms as per the clauses adverted to above of which he was patently and indisputably in breach. On account of this, I upheld the defence contention that D1 and D2 had the right to terminate the S/A for failure of consideration and redeem the 4.9 million shares transferred to him. As regards his removal as director of D4, PW1 had failed to show that the removal was not in accordance with law and/or the articles of association of D4. Lastly, as D4 had obtained final judgment in the Terengganu suit solely through the efforts of D1 who engaged and financed solicitors without any assistance from PW2, D1 and D2 had no further obligation under the S/A to maintain the said shares in the name of PW2 on account of his breach of fundamental terms of the S/A.

[22] PW1's breach of undertaking stipulated in cl 4(b) of the S/A was undoubtedly of a serious nature that went to the root of the contract and entitled the defendants to rescind and seek restitution of the parties to the status quo ...

[23] I am in agreement with the defence contention that the defendant had the right to rescind and terminate the contract in view of the above breach of a fundamental term of the contract as it concerned the failure to honour the undertaking to secure final settlement with the Terengganu Government which was the very purpose of the S/A as stipulated.

[55] It was submitted that the attack by the learned trial judge on the credibility of the appellant was an irrelevant exercise as it was based on a wrong or improper understanding of the evidence and on errors of law in the interpretation of the settlement agreement.

[56] We were unable to accede to the argument. In our view the learned trial judge was not wrong to direct his mind to the question of whether the appellant had breached the settlement agreement. The evidence was before him and it was his duty to consider the evidence unless it was inadmissible, such as being hearsay, which was not the case here.

[57] Whether the settlement agreement had in fact been breached must to be determined based on facts which in turn depended on the learned trial judge's assessment of the credibility of the witnesses.

[58] Surely, the question whether the appellant had taken steps to secure the 'final settlement amount' with the Terengganu State Government as required of him by cll 1 and 2 of the settlement agreement was a question of fact with respect to which a finding was necessary for the learned trial judge to come to a decision whether the appellant had breached the settlement agreement or otherwise.

[59] As for the issue of unpleaded material facts raised by learned counsel for the appellant, we found no substance to the argument as evidence on the

breach of the settlement agreement by the appellant was adduced by the respondents during the trial and no objection was raised by the appellant.

[60] In this regard the decision of the then Supreme Court in *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 is relevant, where it was held (1) as follows:

> The underlying well-known rationale for requiring material facts to be pleaded is to prevent the opposing party from being taken by surprise by evidence which departs from the pleaded material facts. However, when evidence represented a departure from the pleadings, it should be objected to when and where it was adduced, and it would be too late when it was only objected to later on, as in the final submission at the close of evidence in the instant appeal. Otherwise, in the event of such an objection being accepted by the court, the party adducing such evidence may face the risk of being denied leave to amend his pleadings at that stage.

[61] We agreed with the learned trial judge that the appellant's breach of the settlement agreement entitled the respondents to put an end to the agreement as the breach was of a fundamental nature going to the root of the contract.

[62] The appellant was supposed to discharge his obligations under the settlement agreement, but in breach of the agreement, he failed to do so, and yet insisting that he should retain the 4.9 million shares for himself on the purported ground that no 'final judgment' or 'final settlement amount' had been obtained from the court.

[63] Under the circumstances the respondents had the right to rescind the contract and to seek restitution of the parties to the status quo: *S & M Jewellery Trading Sdn Bhd & Ors v Fui Lian-Kwong Hing Sdn Bhd* [2015] 5 MLJ 717; [2015] 8 CLJ 16 (FC). Section 40 of the Contracts Act 1950 is also relevant and provides as follows:

> When a party to a contract has refused to perform or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence.

[64] On the pleadings and on the evidence before him, we were of the view that the learned trial judge was perfectly entitled to come to a finding that the appellant had breached the settlement agreement. With respect, we found no basis for learned counsel to contend that the learned judge had committed errors of law or had mishandled the facts or was confused as to the issues to be tried.

[65] As can be seen from the grounds of judgment, the finding was made after a careful and meticulous examination of the evidence by the learned trial

judge and after considering the arguments by both sides.

[66] The principle is clear that an appellate court does not interfere willy nilly with findings of fact made by the trial judge, more so where the findings involve the question of the credibility of the witnesses, unless it can be shown that the findings are plainly wrong or perverse or that the trial judge has failed to take proper advantage of his having seen and heard the witnesses giving evidence.

[67] We did not find that to be the case in the present appeal as the finding of the learned trial judge was based on actual evidence before him and he had not misdirected himself either on the law or on the facts.

[68] There is authority to say that if the findings of the trial court are reasonably open on the evidence, it is not enough to warrant their reversal just because an appellate court would have come to a different view: see the dissenting judgment of Raja Azlan Shah FJ (as His Late Royal Highness then was) in *Samar binte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71.

[69] Thus, even if we were disposed not to agree with the learned trial judge's conclusion on the finality of the Terengganu High Court judgment, our view was that the learned trial judge was right in any event to hold that the settlement agreement had been properly terminated by the respondents due to its breach by the appellant, thereby validating the retransfer of the 4.9 million shares to the first and second respondents.

[70] It is pertinent to note that the appellant himself admitted that he failed to comply with cll 2 and 4(b) of the settlement agreement. The breach had therefore been established by the appellant's own admission. Such admission carried more weight than evidence, oral or documentary, coming from the respondents.

[71] As for the appellant's removal from the fourth respondent, we had no reason to disagree with the learned trial judge that the appellant failed to show that his removal was not in accordance with the law or the articles of association of the fourth respondent. On the evidence before him, the learned trial judge was entitled to come to that conclusion.

[72] It was for all the reasons above-stated that we dismissed the appellant's appeal with costs RM20,000 payable to respondents (1)–(4) and RM5,000 to respondent (5) subject to payment of the allocator fee. The deposit was refunded to the appellant.

Appeal dismissed and decision of High Court affirmed.

Reported by Ahmad Ismail Illman Mohd Razali